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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 755.

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

BRIEF OF APPELLANT.

Opinion Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 1967 Mass. Adv. Sh. 1301, and 229 N.E. 2d 245 (1967). It is set forth at pages 31 to 58 of the Appendix.

Jurisdiction.

On July 27, 1967, the Supreme Judicial Court for the Commonwealth of Massachusetts entered a judgment (Re-

script) which concluded that the taxes imposed by the Massachusetts Sales and Use Tax Statute (St. 1966, c. 14, § 1 and § 2), as applied to the appellant, a national bank, are not repugnant to the Constitution and laws of the United States, and decreed that Emergency Regulation No. 6, which was issued by the appellee, is valid insofar as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts Sales and Use Taxes. A final decree pursuant to the rescript was entered on August 9, 1967. This appeal was taken from the judgment of the Supreme Judicial Court and from the final decree entered pursuant thereto.¹

Since the validity of a state statute on the ground of its being repugnant to the Constitution or laws of the United States is drawn in question and the decision below is in favor of its validity, the jurisdiction of this Court is invoked pursuant to 12 U.S.C. § 1257(2) (1964). This appeal was docketed and a jurisdictional statement filed within ninety days of the date of rescript in accordance with 12 U.S.C. § 2101(c) (1964), and Supreme Court Rule No. 13.

Statutes Involved.

The federal and Massachusetts statutes directly involved are, respectively, 12 U.S.C. § 548 (1964), and St. 1966, c. 14, § 1 and § 2, as amended by St. 1966, c. 483 (see p. 55,

¹ The Supreme Judicial Court for the Commonwealth of Massachusetts is not a court of record. The record in this case is in the Supreme Judicial Court for Suffolk County. Although the rescript of the Supreme Judicial Court for the Commonwealth of Massachusetts is final for purposes of appeal to this Court (*Cole v. Violette*, 319 U.S. 581), it is the Massachusetts practice to enter a further final decree upon the rescript. To avoid any question, this appeal was taken from both the rescript and the final decree.

infra, and p. 57, *infra*).² Also involved is Emergency Regulation No. 6, issued by the State Tax Commission, appellee (see p. 74, *infra*).

Questions Presented.

The ultimate question presented is whether the Massachusetts Sales and Use Tax Statute, St. 1966, c. 14, §§ 1, 2 (and similarly Emergency Regulation No. 6), is invalid when applied to purchases by the appellant, a national bank, because the application of these Massachusetts statutory provisions (and this Regulation) to such sales and uses is repugnant to the Constitution and laws of the United States.

This ultimate question involves, among others, the following subsidiary questions:

1. Does 12 U.S.C. § 548 (1964), prohibit the application of St. 1966, c. 14, § 1 (Sales Tax Statute), and St. 1966, c. 14, § 2 (Use Tax Statute), to purchases by a national bank?

2. Does the Constitution of the United States prohibit the application of St. 1966, c. 14, § 1 (Sales Tax Statute), and St. 1966, c. 14, § 2 (Use Tax Statute), to purchases by a national bank because a national bank is an instrumentality of the United States immune from all state taxation except such as has been specifically permitted by Congress?

3. For the purpose of determining whether a national bank is immune from the Massachusetts Sales Tax, is the legal incidence of the Sales Tax with respect to purchases made by a national bank on the bank as a vendee?

² Under the provisions of this statute, both taxes were due to expire on December 31, 1967. However, on November 29, 1967, the Sales and Use Taxes were made permanent (with no changes relevant to this appeal) as chapter 64H and chapter 64I, respectively, of the Massachusetts General Laws. See St. 1967, c. 757.

Statement of the Case.

1. *Material Facts.* The appellant, First Agricultural National Bank of Berkshire County, is a national bank organized under 12 U.S.C. § 21 *et seq.*, with its principal place of business in Pittsfield, County of Berkshire, Massachusetts (A. 17-18). It is one of ninety national banks within the Commonwealth of Massachusetts (A. 19). The appellee is the State Tax Commission of the Commonwealth of Massachusetts (A. 61, 62).

Since April 1, 1966, the appellant has paid Massachusetts Sales and Use Taxes on purchases for its own use of tangible personal property (A. 18).

On March 28, 1966, the appellant, by its counsel, requested a ruling or emergency regulation that national banks are exempt from Massachusetts Sales and Use Taxes (A. 18). No ruling was received by the appellant or its counsel pursuant to such request. On May 31, 1966, however, the State Tax Commission issued Emergency Regulation No. 6, which ruled that "The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax" (A. 18).

2. *Proceedings Below.* A bill for declaratory relief under chapter 30A, § 7, and chapter 231A of the General Laws of Massachusetts was filed on August 2, 1966, with the Justice of the Supreme Judicial Court for the County of Suffolk (A. 2-15). This bill was filed by the appellant against the State Tax Commission (A. 2). In substance the bill sought a declaration that the recently enacted Massachusetts Sales and Use Taxes could not be applied to purchases made by a national bank (A. 7-8).

More particularly, the appellant prayed, *inter alia*, for a binding declaration under chapter 231A of the General Laws that sales to the appellant are exempt from the tax imposed

by St. 1966, c. 14, § 1, because the Commonwealth of Massachusetts is prohibited from taxing such sales under the Constitution or laws of the United States (A. 7). The bill also sought a binding declaration under chapter 231A of the General Laws that the storage, use or other consumption of tangible personal property by the appellant is exempt from the tax imposed by St. 1966, c. 14, § 2, because the Commonwealth of Massachusetts is prohibited from taxing such storage, use or other consumption under the Constitution or laws of the United States (A. 7). In addition, the bill sought judicial review of Emergency Regulation No. 6 issued by the State Tax Commission (A. 8).

The appellee filed an answer which admitted all the allegations of fact pleaded in the appellant's bill (A. 16). The bill and the answer raised the federal questions which are the subject matter of this appeal (A. 2-17). The parties agreed to a statement of all the material facts constituting a case stated (A. 17-29).

On August 24, 1966, by order of Paul C. Reardon, Justice of the Supreme Judicial Court, this case, at the request of counsel for both parties, was reserved and reported without decision to the Supreme Judicial Court for the Commonwealth of Massachusetts for its determination and judgment or order, upon, among other things, the bill, the answer and the agreed statement of facts constituting a case stated (A. 30).

The Full Court of the Supreme Judicial Court entered a rescript on July 27, 1967, which ordered that a final decree be entered in accordance with the Court's opinion (A. 59). The opinion passed on all the federal questions raised in this appeal (A. 31-58).

3. *Appeal.* Appeal was taken, and on January 15, 1968, this Court noted probable jurisdiction. This case was placed on the summary calendar (A. 63).

Summary of Argument.

The congressional accommodation between the power of the several states to tax on the one hand and the affairs of the Nation on the other is contained in 12 U.S.C. § 548. Congress in this statute has authorized state taxation of national banks in only one of four specified methods (in addition to taxes on their real estate). Neither the Massachusetts Sales Tax nor the Massachusetts Use Tax is one of the four methods of state taxation so authorized.

This Court has repeatedly and consistently held that the respective states are wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, except as set forth by Congress. Despite the uncontroverted and overwhelming authority of these decisions, the Court below decided that the several states are completely free to employ any other methods of taxation of national banks even though these other methods are not set forth in section 548. This violates the clear legislative intent of Congress.

The legislative history of section 548 establishes that Congress intended to define the outer limit of state taxation of national banks when it enacted the original predecessor to section 548 and subsequent amendments thereto. The congressional basis for working out the scope of state taxation was legislative and not constitutional in nature. That Congress intended to prohibit state taxation of national banks (other than as expressly permitted) is confirmed by the congressional rejection of proposed amendments which would have expressly permitted much broader state and local taxation of national banks. This intent is also confirmed by subsequent congressional amendments, legislation in 1935 subjecting national banks to state unemployment taxation, and the failure to enact a Senate bill

which was filed in 1950 and which would have expressly permitted the levying of state sales and use taxes on national banks.

The opinion below is, in effect, an attempt to resurrect and judicially enact that 1950 Senate bill. In so attempting, the Massachusetts Court invoked the judicial canon that tax immunity must be expressly conferred. All the cases relied on by the Court below, however, involved statutes which conferred a limited immunity; and hence the question in those cases was whether that immunity could be judicially extended by implication. In sharp contrast is the issue on this appeal—whether, by permitting certain methods of state taxation, Congress intended to prohibit other methods. Since the congressional intent is clear with respect to 12 U.S.C. § 548, resort by the Court below to that judicial canon of construction was inappropriate in the first place. In any event, that canon should have no application where the decisions of this Court had firmly established a doctrine of constitutional immunity from state taxation which makes any express congressional prohibition superfluous.

Moreover, the conclusion reached by the Massachusetts Court is more than anomalous. Although section 548 places fairly elaborate and complex restrictions on the taxation of national-bank shares, dividends derived therefrom, and taxes on or measured by national-bank income, no longer (according to the Court below) would this congressional legislation restrict in any manner whatsoever other methods of state taxation. The opinion below thus disfigures the workable congressional accommodation contained in section 548, between the concerns of the Nation and the power of the several states to tax.

The prior decisions of this Court which have established the immunity of national banks from state taxation, except

as permitted by Congress, control the disposition of this case. They are sound law and have become "embedded" in section 548. These decisions are part of the "arch" on which the entire structure of national-bank taxation rests. Statutory interpretation, moreover, should not be altered after long standing congressional acceptance of these prior decisions. The parallel judicial and legislative activity with respect to 12 U.S.C. § 548, plainly establishes congressional reliance on these judicial pronouncements. For this reason, these decisions have become an integral part of section 548, and therefore should remain unmarred.

As federal instrumentalities, national banks (in the absence of congressional consent) are immune from state taxation. In deciding to the contrary, the Court below, in effect, ignored the decisions of this Court and the courts of sister states which have been handed down since 1913 (the year that the Federal Reserve Act was adopted), and hence after the alleged metamorphosis of national banks upon which the Court below primarily relies. The decision below also disregards the fact that national banks still retain their character as federal instrumentalities. They are creatures of the Federal Government and are chartered under the National Bank Act, which established a national banking system. As the *sine qua non* of the national banking system, national banks are the core of the federal banking structure. In addition to their membership in the national banking system, national banks are also the keystone of the Federal Reserve System. They are the only financial institutions of any kind which are *required* to be members of the Federal Reserve System. As *required* members of the Federal Reserve System, national banks are the indispensable vehicles for effecting national fiscal policy.

Both the Massachusetts Sales and Use Taxes are levied on national banks as purchasers. The use tax is not even

arguably on anyone other than the purchaser. The question of whether the Massachusetts Sales Tax is also a tax upon the purchaser is a federal one which should be decided by this Court. The rights of the appellant under 12 U.S.C. § 548, rest upon the characterization of the Massachusetts Sales Tax as a vendor or vendee tax. That such a tax is a vendee tax is clearly established by the decisions of this Court and the courts of the several states. These authorities hold that, where a sales tax is *required to be added* to the sales price and *collected* from a purchaser, the legal incidence of that tax is on the purchaser. This is precisely the nature of the Massachusetts Sales Tax. There is, moreover, a penalty for a vendor's failure to so add and collect the tax. The tax, furthermore, must be stated and charged separately from the sales price. In addition, vendors cannot advertise that they will absorb or assume it.

For these reasons, the decision of the Court below should be reversed and the imposition of both the Massachusetts Sales and Use Taxes on purchases by national banks should be declared repugnant to the laws and the Constitution of the United States.

Argument.

I. CONGRESS, BY THE PROVISIONS OF 12 U.S.C. § 548, HAS PROHIBITED THE IMPOSITION OF THE MASSACHUSETTS SALES AND USE TAXES ON PURCHASES BY A NATIONAL BANK.

Basic to the nature of our federalism is the necessity of accommodating the concerns of the Nation and those of the several states. Congress, in furthering the legitimate ends of the Federal Government, established a nationwide system of banks. At the same time, Congress chose to permit the continued existence of state banking systems. Having due regard for the importance, national character and

purposes of the national banking system, however, Congress for over one hundred years has carefully defined and re-defined the manner and extent to which the states are permitted to tax national banks. The statutory provision which reflects this congressional accommodation of the power of the several states to tax on the one hand, and the affairs of the Nation on the other, is 12 U.S.C. § 548.

Congress in this statute has authorized state taxation of national banks in only one of four specified methods (in addition to taxes on their real estate). Neither the Massachusetts Sales Tax nor the Massachusetts Use Tax is one of the four methods of state taxation so authorized.³ The Massachusetts Sales and Use Taxes are not taxes levied on shares (or dividends therefrom) of a national bank; nor are they taxes on the net income (or according to the net income) of such a bank. Accordingly, the application of the Massachusetts Sales and Use Taxes to purchases by a national bank is prohibited by 12 U.S.C. § 548.

The decision below, however, held that a state can tax a national bank notwithstanding this congressional prohibition. This is in direct conflict with the decisions of this Court, which has repeatedly and consistently held that the

³ The question of whether the Massachusetts Sales Tax can be applied to purchases by a national bank involves the subsidiary question of whether the legal incidence of the sales tax is on the seller or the purchaser. The decision below held that the legal incidence of said tax was on the seller. The appellant, at pages 41 to 53 of this brief, contends that this is a federal question which was erroneously decided. For this reason, in discussing the tax-immune status of national banks, reference is made to both the Massachusetts Sales and Use Taxes. Even if this Court decides (as appellant submits it should not) that the legal incidence of the Massachusetts Sales Tax is on the seller, a decision on the issues relating to the tax-immune status of national banks as purchasers is still necessary to the disposition of this appeal. This is so because the incidence of the Massachusetts Use Tax is not even arguably on anyone but the purchaser.

respective states are wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, except as set forth by Congress. *Owensboro National Bank v. Owensboro*, 173 U.S. 664, 668 (1889). *Bank of California v. Richardson*, 248 U.S. 476 (1919). *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 106 (1923). *First National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 347 (1926). *First National Bank of Hartford, Wisconsin v. Hartford*, 273 U.S. 548, 550 (1927). *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931). *Maricopa County v. Valley National Bank of Phoenix*, 318 U.S. 357 (1943). See *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41 (1940).⁴

In *Michigan National Bank v. Michigan*, 365 U.S. 467, 472 (1961), the majority opinion noted that this Court had passed on section 548, and its predecessors, over fifty-five times in the near century of the section's existence. Both the opinion of this Court and the dissent by Whittaker, J., joined by Douglas, J., confirm that the sole authorization under which a state is permitted to tax a national bank is section 548.

Despite the uncontroverted and overwhelming authority of these decisions, the Court below decided that the several states are completely free to employ any other methods of taxation of national banks (except perhaps for discriminatory taxation) even though these other methods are not

⁴ This well-established and (until the decision below) uncontroverted proposition has been unqualifiedly recognized by numerous state Court decisions. *First National Bank of Birmingham v. State*, 262 Ala. 155, 77 So. 2d 653 (1954). *O'Neil v. Valley National Bank of Phoenix*, 58 Ariz. 539, 121 P. 2d 646 (1942). *First National Bank & Trust Co. v. West Haven*, 135 Conn. 191, 62 A. 2d 671 (1948). *First National Bank of Portland v. Marion County*, 169 Ore. 595, 130 P. 2d 9 (1942). *Northwestern National Bank of Sioux Falls v. Gillis*,—S.D.—, 148 N.W. 2d 293 (1967). *Austin v. Seattle*, 176 Wash. 654, 30 P. 2d 646 (1934).

set forth in section 548. This is not only squarely contrary to the teachings of this Court, but also violates the clear legislative intent of Congress. That intent distinctly emerges from the legislative history of section 548.

In 1863 Congress established the national banking system. One year later the original predecessor to section 548 was passed, along with other amendments designed to correct defects in the 1863 legislation.⁵

⁵ The 1863 Currency Act contained no provision for State taxation of national banks or their shares. Act of February 25, 1863, c. 58, 12 Stat. 665. The relevant portion, section 41, of the 1864 legislation reads as follows:

"In lieu of all existing taxes, every [national bank] shall pay to the Treasurer of the United States, in the months of January and July, a duty . . . : *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body-corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *Provided further*, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located: *Provided, also*, That nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed." Act of June 3, 1864, c. 106, § 41, 13 Stat. 111.

A technical amendment was made to the statute in 1868, Act of February 10, 1868, c. 7, 15 Stat. 34. Congress in 1878 redesignated the section as section 5219 of the Revised Statutes. In response to the decision of this Court in *Merchants' National Bank of Richmond, Virginia v. Richmond*, 256 U.S. 635 (1921), an amendment was passed to clarify the standard of "competing capital" which that case brought into focus. The 1923 amendment

During the debates on these amendments and in response to a concern expressed by Senator Sumner, with respect to the state taxation of national banks (the 1863 legislation contained no such provision), Senator Fessenden, Chairman of the Finance Committee, emphasized that the bill would *limit* as well as permit state taxation.

"If the Senator reads this bill he will perceive that all of the power of taxation upon the operations of the bank itself, all upon the circulation, all upon the deposits, all upon everything which can properly be made by a tax is reserved to the General Government; that the States cannot touch it in any possible form; that they are limited and controlled; the simple right is given them to say that the property which their own citizens have invested in it shall contribute to State taxation precisely as other property.⁶

Congress, of course, was well aware of the decision in *M'Culloch v. Maryland*, 4 Wheat. 316 (1819). The congressional debates are replete with references to it.⁷ With Chief Justice Marshall's opinion looming in the background, Congress realized that it was determining the outer limit of state taxation of national banks.

Congress also was conscious of the fact that this determination was legislative and not constitutional in nature. Congressional policy—not constitutional doctrine—was the

also permitted states to tax national bank dividends and income. Act of March 4, 1923, c. 267, 42 Stat. 1499. Section 548 was amended for the last time in 1926 to permit states to levy franchise and excise taxes on national banks measured by the entire income (including income from tax-exempt securities) of the banks. Act of March 25, 1926, c. 88, 44 Stat. 223.

⁶ Cong. Globe, 38th Cong., 1st Sess., 1895 (1864).

⁷ See, e.g., *id.*, pp. 1893-1899.

basis for working out the scope of state taxation. This was made clear by Senator Sumner:

"If you allow the State to interfere with the proposed system by taxation in any way, may they not embarrass it? Where shall they stop? Where will you run a line? Unquestionably, according to the Supreme Court, they cannot tax the bank directly. This would be unconstitutional. But it is said that they may tax the shares. Now I raise no constitutional question. It may be that a tax on shares is constitutional. But I do not propose to consider it on this ground. I am now arguing against the policy of allowing any such tax. It is a question of expediency which I raise, for the sake of the system we are about to establish. But here the rule seems clear. Every consideration which can be urged against taxing the bank directly may be urged against taxing the shares. If it be bad policy in one case, it must be bad policy in the other."⁸

This view was confirmed by one of his leading adversaries, Senator Fessenden:

"The question there [in *M'Culloch v. Maryland*] was whether a State could impose a tax upon the operations of an instrumentality made by this Government for its own purposes. That is the first distinction between the cases. There is another distinction. Here we propose, we who pass the act, the authority of the Government which makes the instrumentality, propose to say that to a certain exercise of power on the part of the States we assent; and therefore all the argument adduced from this decision had not the slightest applicability in the world. But when we come to the question of

⁸ *Id.*, p. 1893.

. *expediency*, the question of *propriety*, the question of *what is wise* in reference to this matter, the honorable Senator and myself may differ, and we do differ."⁹
 4. (Emphasis supplied.)

In making this policy decision, *M'Culloch v. Maryland* served as a reminder that state regulation and state taxation posed a potential threat to the national banking system. For example, this case was cited by Senator Sumner in urging that national banks should be completely immune from such taxation:

"It was there insisted that the tax was unconstitutional. But the words of the Chief Justice seem almost intended for the present occasion.

"Now, sir, every consideration, every argument⁷⁰ which goes to sustain this great judgment may be employed against the proposed concession to the States of the power to tax this national institution in any par-

⁹ *Id.*, p. 1895. The same view was also expressed by Senator Colamer:

"That is a mere question of policy; of expediency. It is not a question of constitutional law particularly. I never stated that it was. The honorable Senator from Massachusetts read a great deal from the opinion of Chief Justice Marshall in *McCulloch's* case. What on earth has that to do with this question? That was a case where the General Government made a bank and the State of Maryland undertook to tax the operations of that bank in that State. The court decided that the State could not do it. The question before us now is, will we agree in Congress to say that the State may have the power of taxation to a certain extent? Is there anything unconstitutional in that? Has that anything to do with the *McCulloch* case? Nothing in the world, as a question of expediency, not that a decision of a constitutional right and wrong has nothing to do with it." *Id.* p. 1899.

ticular, whether directly or indirectly. The reason of the judgment is as strong against an indirect tax as against a direct tax.”¹⁰

Congress also had concerns other than protecting national banks from the potentially destructive forces of state taxation. One purpose of the 1864 amendments was to induce state banks to convert into national banks.¹¹ Congress realized that the degree of protection it afforded national banks from state, municipal and local taxation would affect the willingness and rapidity with which state banks would so convert.¹² This objective, of course, was purely legis-

¹⁰ *Id.* at 1893-1894.

¹¹ In the debates, Congressman Hooper stated:

“It should be borne in mind that this is not a bill to establish the system of national banks; its only purpose is to amend the act which established that system, to correct what the experience and observation of the past year have shown to be imperfect, and to *render the law so perfect that the State banks may be induced to organize under it, in preference to continuing under their state charters.*” (Emphasis supplied.) *Id.* at 1256.

¹² This observation was made in both Senate and House debates.

“I never questioned the right and power of the Government to levy this tax, or any other tax, upon these banks; and I do not now question that power. Nor do I question the power of Congress to turn these banks over to State, town, city, and municipal taxation. The position which I took was, that in case this was done it would destroy the bill; that no bank could or would be organized under the bill after the adoption of that amendment.” *Id.* at 1891 (remarks of Senator Chandler).

“This bill holds out inducements to others to invest their means in bank stock so that they may avoid their portion of the State taxation which should justly fall on every individual in the State according to the value of his personal property. I know no reason why the amendment should prevail.” Cong. Globe, 38th Cong., 1st Sess., 1393 (1864) (remarks of Congressman J. C. Allen).

lative in character and wholly without constitutional dimension.

The proceedings of both the House and the Senate indicate that there was a polarization of views around those favoring full nondiscriminatory state taxation of national banks and those favoring a complete exemption of national banks from such taxation. The resulting statute was a compromise designed to permit certain forms of state taxation and to prohibit others. This congressional accommodation provided the several states with a source of revenue while at the same time furthering the development of the national-banking system and its protection.

In reaching this compromise, proposed amendments expressly permitting much broader state and local taxation of national banks were introduced, debated and rejected by the Congress. Among these was an amendment introduced in the House which would have made national banks subject, without exception, to all state and local general taxes on personal as well as real property.

“And the said associations or corporations shall severally be subject to State and municipal taxation upon their real and personal estate, the same as persons residing at their respective places of business are subject to such taxation by State laws.”¹³

The rejection of these broader, more permissive measures demonstrates a clear congressional intent to prohibit all state, municipal and local taxation of national banks except as specifically set forth in the statute. With this prohibition in mind, Congress passed an amendment in 1923 in order to permit the several states to tax the income of national banks—a method of taxation which was becoming an in-

¹³ *Id.*, p. 1392. For another more permissive tax proposal which was also rejected, see the discussion relating to an amendment to H.R. 333, *Id.*, p. 1452.

creasingly important source of revenue for the states. In 1926, Congress broadened the authority of the several states to tax national banks for the last time. This amendment permitted the states to levy franchise and excise taxes on national banks measured by the income of the banks.¹⁴

The prohibitive, as well as the limited-permissive, character of section 548 (apparent from the legislative history of this section) has been recognized by this Court. In *Bank of California v. Richardson*, 248 U.S. 476 (1919), it was noted that the predecessor to section 548, which is in no way materially different from section 548 as presently in force for the purposes herein cited, was intended to control comprehensively the subject with which it dealt and thus to furnish the exclusive rule governing state taxation of national banks.

"There is also no doubt from the section that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section. All possibility of dispute to the contrary is foreclosed by the decisions of this court." 248 U.S. at 483.

This Court further noted that two provisions in apparent conflict were adopted by the Congress: first, the absolute exclusion of power in the states to tax national banks (in order to prevent any state interference with their operations, the integrity of their assets or the administrative governmental control over their affairs); second, preservation of the taxing power of the several states so that the financial resources engaged in the development of national banks might not be wholly withdrawn from the reach of state taxation. The first aim was accomplished by the non-

¹⁴ See page 12, n. 5.

recognition of any power in the states to tax national banks except as to real estate. The second was reached by permitting taxation of the stockholders of national banks.

“Full and express power on that subject [taxation of national bank stockholders] was given, accompanied with a limitation preventing its exercise in a discriminatory manner, a power which again from its very limitation was exclusive of other methods of taxation and left, therefore, no room for taxation of the federal agency or its instrumentalities or essential accessories, except as recognized by the provision in question.” 248 U.S. at 483, 484.

This understanding of section 548 and the congressional policy it embodies was vividly underscored by the passage of section 3305(b) of the Internal Revenue Code.¹⁵ This provision was enacted in order to subject national banks to state unemployment taxes. Such action was obviously necessary from Congress's point of view, because section 548 prohibited such taxation in the absence of express congressional permission. Its passage confirmed the long-standing intent of Congress to permit state taxation of national banks in only certain specified ways. In enacting this provision, the House Ways and Means Committee Report

¹⁵ § 3305(b) of the 1954 Internal Revenue Code was originally enacted in 1935. Act of August 14, 1935, c. 531, Title IX, § 906, 49 Stat. 642. It was incorporated into the 1939 Internal Revenue Code as § 1606(b). A 1960 amendment modified some of the language referring to certain federal instrumentalities, but without any change in wording or substance as far as national banks were concerned. Act of September 13, 1960, Pub. L. No. 86-778, Title V, § 531(a), 74 Stat. 983. A companion provision in both the 1939 code and the 1954 code, § 1606(c) and § 3305(c) respectively, granted the states, *inter alia*, the right to require unemployment-tax returns from national banks.

had this to say about national banks as federal instrumentalities:

“Subsection (b) confers on State legislatures authority to require instrumentalities of the United States . . . to comply with State unemployment compensation laws. Under this amendment the States would be able to cover under their unemployment compensation systems national banks and certain other Federal instrumentalities . . .” H.R. Rep. No. 728, 76th Cong., 1st Sess., 71 (1939).

A similar statement appeared in the Senate Finance Committee report on the bill. S. Rep. No. 734, 76th Cong., 1st Sess., 83 (1939).

In contrast to granting the several states a specific and carefully limited authority to tax (such as the authority to levy unemployment taxes on national banks), Congress on appropriate occasions has given the states a broad and general authority. For example, Federal Savings and Loan Associations are subject to all nondiscriminatory state, municipal and local taxation. 12 U.S.C. § 1464(h) (1964). This is also true of so-called Edge Act corporations, which are established to engage in international and foreign banking. 12 U.S.C. § 627 (1964).¹⁶

It is clear that, unlike the taxation of Federal Savings and Loan Associations and Edge Act corporations, Congress never intended to subject national banks to extensive or unlimited state taxation. In fact, in 1950 a bill was

¹⁶ In modern times Congress has also created federal financial institutions which have been given an express and unqualified exemption from state taxation. See, *e.g.*, 12 U.S.C. § 1433 (1964), and 12 U.S.C. § 1768 (1964), relating to Federal Home Loan Banks and Federal Credit Unions respectively. These statutes are of recent vintage, unlike section 548, which traces its origin back to another era and which contains somewhat archaic language.

sent to the Subcommittee on Banking and Currency which would have granted the states broad authority to tax national banks. S. 2547, 81st Cong., 1st Sess. (1950). None of the provisions of this bill were ever enacted. The bill, *inter alia*, expressly authorized states to levy sales and use taxes (such as the Massachusetts Sales and Use Taxes) on national banks. S. 2547 stated in part: "... A State or any subdivision thereof may also subject associations [national banks] to taxes and license fees upon the purchase, sale, or use of tangible personal property and public utility services." The members of the subcommittee fully realized that, without such legislation, national banks would not be subject to sales and use taxes. *Hearings on S. 2547 Before the Subcomm. on Federal Reserve Matters of the Senate Committee on Banking and Currency*, 81st Cong., 1st Sess., 9 (1950). This 1950 proposed legislation never became law.

The opinion below is, in effect, an attempt to resurrect and judicially enact that 1950 Senate bill. In so doing, the Massachusetts Court relied on cases which were read as standing for the broad proposition that tax immunity must be expressly conferred.¹⁷ Those decisions, however, are wholly inapposite. They did not involve in any way a federal statute which authorized state taxation. Where a statute was involved in those decisions, it was a statute which conferred a limited immunity, and, hence, the issue was whether that immunity could be judicially extended by

¹⁷ *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939). *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939). *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943). *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 366 (1949). The Court also remarked that section 548 "... only purports to regulate taxation of national bank shares ..." (A. 56.) This is not true. Section 548 expressly provides that "The several States may ... tax such associations [national banks] on their net income, or ... according to or measured by their net income. ..."

implication. That issue is a far different matter from that presented by section 548. Here, the issue is whether, by permitting certain forms of state taxation, Congress intended to prohibit other such forms. As previously demonstrated, Congress clearly intended such prohibition. Resort by the Court below to the canon of construction that tax immunity must be expressly conferred was therefore inappropriate in the first place. In any event, the canon clearly should have no application in a situation (such as that presented by section 548) where the decisions of this Court had firmly established a doctrine of constitutional immunity from state taxation at the time or times Congress passed or amended the statute in question. In short, the Court below would require of Congress that which this Court made superfluous. It is submitted that this is judicial legislation in the guise of judicial construction.

The conclusion reached by the Massachusetts Court is more than anomalous. Under the reasoning of that opinion, the several states are completely free to employ any method of taxation of national banks (except perhaps for discriminatory taxation) which they see fit. The only restrictions on the states, according to the opinion below, are those contained in section 548. This result is most perplexing. The decision below (if allowed to stand) would produce the following consequences: First, although section 548 places fairly elaborate and complex restrictions on the taxation of national bank shares, dividends derived therefrom, and taxes on or measured by national-bank income, no longer would this congressional legislation restrict in any manner whatsoever other methods of state taxation; and second, while a state may tax a national bank in only one of the methods set forth in section 548 in lieu of all the other methods so set forth, the several states could levy innumerable other types of taxes. This interpretation of

section 548, of course, directly conflicts with the decisional law and the intent of Congress.

The Court below certainly should have heeded the warning of this Court in *Federal Land Bank v. Bismarck Co.*, 314 U.S. 95, 104 (1941):

“It is not our function to speculate whether the immunity from one type of tax, as contrasted with another, is wise. That is a question solely for Congress, acting within its constitutional sphere, to determine.”

Where there has been a workable congressional accommodation between the concerns of the Nation and the power of the several states to tax, it should be adhered to. If such an accommodation unduly intrudes upon either the business of the Nation or that of the several states, it is for Congress to make the desirable adjustment.

Congress has said, and this Court has recognized, that section 548 defines the limit beyond which a state is prohibited to tax national banks. For this reason, the levying of a Massachusetts Sales and Use Tax on purchases by national banks violates this federal statute.

II. PURCHASES BY NATIONAL BANKS ARE IMMUNE FROM THE MASSACHUSETTS SALES AND USE TAXES BECAUSE CONGRESS HAS NOT PERMITTED SUCH TAXATION.

A. Decisions Establishing This Immunity may Not be Re-examined; because they have Become “Embedded” in 12 U.S.C. § 548, and have been Relied upon by Congress.

From the time of *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), the fact that national banks are instrumentalities

of the Federal Government, properly created by Congress in the exercise of its constitutional power, has been well settled and (until the decision below) uncontroverted. Since Chief Justice Marshall's historic decision, this Court has repeatedly recognized and reaffirmed this principle. It would be to labor a point to cite and discuss more than a few of these cases.

In *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), two national banks claimed that state taxing officers exacted *ad valorem* taxes on their shares of stock at rates higher than were exacted from competing moneyed interests. The issue was the legal effect under the federal law of this wrongful administration of the state law. This Court held that these banks were subjected to discriminatory taxation which was forbidden by congressional legislation. In so deciding, this Court also held that a national bank was an instrumentality of the United States, and, as such, could not constitutionally be taxed by a state except as permitted by federal statute.

Owensboro National Bank v. Owensboro, 173 U.S. 664 (1889), involved an attack on the validity of a state tax based in part on the nature of the tax notwithstanding its discriminatory or nondiscriminatory nature. This Court held that the taxes imposed upon the bank and its property or franchise were void. In so holding, the Court said:

"The principles settled by the cases just referred to and subsequent decisions were thus stated by this court in *Davis v. Elmira Savings Bank*, 161 U.S. 283:

" 'National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such at-

tempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.'

"It follows then necessarily from these conclusions that the respective States would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress." 173 U.S. at 667-668.

This Court was fully cognizant that there were many differences between the Bank of the United States, which was the subject of the *M'Culloch* decision, and national banks chartered under the National Bank Act. Nevertheless, this Court emphasized that the principles set forth in that landmark opinion were equally applicable to these banks. The status of national banks chartered under the National Bank Act in our federal system was fully considered in *Easton v. Iowa*, 188 U.S. 220, 229 (1903):

"That legislation [the National Bank Act] has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States. Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated

for private gain. The principles enunciated in *M'Culloch v. Maryland*, 4 Wheat. 316, 425, and in *Osborn v. United States Bank*, 9 Wheat. 738, though expressed in respect to banks incorporated directly by acts by Congress, are yet applicable to the later and present system of national banks." 188 U.S. at 229.

That national banks are federal instrumentalities was confirmed as recently as 1963. In *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558-559 (1963), it was held that—

"National banks are federal instrumentalities, and the power of Congress over them is extensive. 'National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit.' *Van Reed v. People's Nat. Bank*, 198 U.S. 554, 557."

Equally well established and deeply entrenched is the corollary principle that the several states are without authority to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, were it not for the permissive legislation (12 U.S.C. § 548) of Congress. *Owensboro National Bank v. Owensboro*, 173 U.S. 664, 668 (1889). *Talbott v. Silver Bow County*, 139 U.S. 438 (1891). *Bank of California v. Richardson*, 248 U.S. 476 (1919). *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 106 (1923). *First National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 347 (1926). *First National Bank of Hartford, Wisconsin v. Hartford*, 273 U.S. 548, 550 (1927). *Iowa-Des Moines National Bank v. Ben-*

nett, 284 U.S. 239 (1931). *Maricopa County v. Valley National Bank of Phoenix*, 318 U.S. 357 (1943). See *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41 (1940). For example, the Court held in the *Anderson* decision that—

“National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent.” 269 U.S. at 347.

As recently as 1961, Justice Clark, speaking for the majority in *Michigan National Bank v. Michigan*, 365 U.S. 467, 472 (1961), observed that this Court had passed on 12 U.S.C. § 548, and its predecessors over fifty-five times in the near century of the section's existence. Both the majority and the dissenting opinions expressly recognized that the sole authorization under which a state is permitted to tax a national bank is 12 U.S.C. § 548. 365 U.S. at 470, 483.

It is inconceivable that there could be any doubt concerning this matter. Only slightly more than one year ago this Court said, in a unanimous decision, that the tax-immunity of national banks as instrumentalities of the United States “is beyond dispute.” *Department of Employment v. United States*, 385 U.S. 355 (1966). This Court held that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation on its operations, and that this immunity had not been waived by congressional enactment. In so holding, this Court noted in an opinion by Justice Fortas, at page 360:

“In those respects in which the Red Cross differs from the usual government agency—e.g., in that its

employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—e.g., national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.” (Emphasis supplied.)

For over a century and on at least fifty-five occasions this Court has considered 12 U.S.C. § 548, and its predecessors. These decisions have clearly, unequivocally and unremittably established that states can directly or indirectly tax national banks only as Congress permits. The appellee now asks this Court to deface all of these prior determinations. As the appellant contends,¹⁸ these authorities, which have been soundly reasoned and decided, control the issues raised on this appeal. Before reaching this question, however, the appellee has the burden of establishing that its request for re-examination of these decisions should be granted. This request should be refused, because these decisions have become an integral part of section 548 and have been relied upon by Congress. This Court has so refused *even* in situations where (unlike the judicial determinations which are the focal point of this appeal) the Court has discredited its own decisions.

It is established that constitutional principles (such as those enunciated in the aforementioned decisions of this Court) become “embedded” in subsequent congressional legislation touching on the same subject matter. This doctrine has particular force where explicit reference to such decisions appears in the statute or (as is true in this case) in its legislative history. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). *Davis v. Department of*

¹⁸ See pp. 34, 41, *infra*.

Labor, 317 U.S. 249 (1942). The doctrine has further been held to be applicable where specific references to the constitutional principles are not contained in the statute or its legislative history, but where (as is also true in this case) congressional awareness of the decisions is beyond dispute. *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 474 (1959).

This doctrine was applied in *State Board of Insurance v. Todd Shipyards*, 370 U.S. 451 (1962), which involved state regulation of insurance companies doing business in interstate commerce. Congress had provided in 15 U.S.C. §1011, that "... the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose *any barrier to the regulation or taxation of such business by the several States.*" (Emphasis supplied.) This Court construed the statute to permit state regulation and taxation only to the extent that such regulation and taxation were constitutionally permissible under decisions made prior to the enactment of the statute. Despite the fact that these prior decisions (unlike the judicial determinations which are the focus of this appeal) were discredited by this Court, and despite this Court's recognition of its "freedom to change our decisions on the constitutionality of law," it was held that—

"When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions . . . we should be loath to change them.

"Here Congress tailored the new regulations for the insurance business with specific reference to our prior decisions. Since these earlier decisions are part of the arch on which the new structure rests, we refrain from

disturbing them lest we change the design that Congress fashioned." 370 U.S. at 457-458.

The content, legislative history and judicial background of the federal statute involved in the *Todd Shipyards* decision are strikingly similar to that of 12 U.S.C. § 548. In both statutes Congress granted the several states power to tax. In each case this Court had enunciated constitutional limitations on the authority of the states to so tax prior to the enactment of the statutes in question. Congress was aware of and had relied on these decisions in making its legislative determination. In reliance on the respective federal statutes and the prior decisional law, the several states had erected comprehensive regimes of state taxation. As in the *Todd Shipyards* case (and the other aforementioned decisions), it is submitted that this doctrine should preclude re-examination by this Court of the vast body of decisional law dealing with the extent to which Congress has permitted state taxation of national banks. These earlier decisions "are part of the arch" on which the structure of national bank taxation rests. Disturbing these decisions will change the design which Congress has fashioned.

There is yet another, but closely related, reason why this Court should not depart from all these prior determinations. Statutory interpretations should not be altered after Congressional acceptance of long standing. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953). *United States v. South Buffalo Railway Co.*, 333 U.S. 771, 774 (1948). While congressional silence may occur in a context which renders the judicial interpretation of this silence unduly speculative, such is certainly not the case when congressional acquiescence parallels a century of noted decisions by this Court—decisions which have prohibited on constitutional grounds state taxation where federal legislation could have

permitted it. *Gwin, White & Prince Inc. v. Henneford*, 305 U.S. 434 (1939). The *Gwin* case held that a state tax measured by the taxpayer's gross receipts from sales of fruit which was shipped out of the taxing state violated the commerce clause of the Federal Constitution. In so holding, this Court stressed that Congress had seen fit not to exercise its constitutional power to alter or abolish the rules which were established by the prior judicial decisions of this Court. In fact, the Court further noted that Congress had accommodated its legislation, as had the states, to these rules as an established feature of our constitutional system.

"For more than a century, since *Brown v. Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. . . . For half a century, following the decision in *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U.S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it." 305 U.S. at 441.

The Court's reasoning in the *Gwin* decision is equally apposite in the instant case. The line of decisions construing section 548 as the outer limit beyond which states cannot tax national banks spans a century. During this period Congress has displayed its continuing concern with respect to such taxation. In 1923 and in 1926 substantive amendments were made which directly affected the scope of the several states' authority to tax national banks.¹⁹ More recently, Congress has subjected national banks to state unemployment taxation.²⁰ In 1950 a Senate bill would, if enacted, have expressly permitted the levying of state sales and use taxes on national banks.²¹ These congressional developments indicate a positive reliance on the decisions of this Court.

Congressional awareness of the determinations of this Court relative to the authority of the several states to tax national banks is well illustrated by the legislation which followed in the footsteps of *Merchants' National Bank of Richmond v. Richmond, Virginia*, 256 U.S. 635 (1921). This decision held that the rate of state taxation of national-bank shares could not be greater than the rate imposed on bonds, notes and other evidences of indebtedness in the hands of individuals. This interpretation did not coincide

¹⁹ The 1923 amendment, among other things, authorized the state taxation of national-bank income and dividends. Act of March 4, 1923, c. 267, 42 Stat. 1499. Congress in 1926 granted to the states the additional alternative of taxing national banks "according to or measured by their income," so that states could for the first time impose a corporate excise or franchise tax on the banks' income from all sources, including tax-exempt securities. Act of March 25, 1926, c. 88, 44 Stat. 223. For an extended discussion of the 1923 and 1926 amendments see H.R. Rep. No. 526, 69th Cong., 1st Sess. (1926).

²⁰ See p. 19, *supra*.

²¹ See pp. 20, 21, *supra*.

with Congress's view of the statute, and so the aforementioned 1923 amendment was passed.²² On that occasion Congress did not (nor on any other occasion has it ever) cast any doubt upon its construction of section 548 as defining the outer limit of state taxation of national banks. In fact, the legislative history of that amendment reaffirms this congressional construction. For example, Senator Pepper, in discussing the 1923 amendment and the *City of Richmond* decision, said:

"Mr. President, this measure is an attempt to deal with a serious difficulty which at present exists in connection with the taxation by the several States of shares in national banking associations. These bodies, being agencies of the Federal Government, may not be taxed by the States excepting in accordance with such legislation as the Congress may from time to time enact."²³

This parallel judicial and legislative activity with respect to 12 U.S.C. § 548, plainly establishes that Congress has fashioned an over-all design for accommodating the states' power to tax national banks and the affairs of the Nation. This accommodation is grounded in congressional reliance on the pronouncements of this Court. These decisions have become an integral part of section 548, and, as such, they represent the foundation upon which the entire structure of national-bank taxation rests. The long-established principle that the several states are without power to levy a tax upon national banks in the absence of permissive legislation by Congress should stand unmarred. 12 U.S.C.

²² 64 Cong. Rec. 1454 (1923) (remarks of Senator Pepper).

²³ *Ibid.*

§ 548, clearly does not authorize the levy by a state of a sales or use tax. For this reason, national banks should be protected from the levying of Massachusetts Sales and Use Taxes on purchases made by such banks.

B. National Banks are Federal Instrumentalities which are Entitled to this Immunity.

The constitutional power and responsibility of Congress with respect to banking and currency is in many respects unique. Unlike many of the Congress's other regulatory functions, banking and currency involves the federal *creation* of the necessary financial structures and instrumentalities through which the financial affairs of the Nation can be conducted. Primary and essential to the complex financial edifice which Congress has created, regulated and protected is the national banking system.

Realizing the primacy and importance of this system, this Court has without exception for over one hundred years protected national banks from state taxation except as Congress, the architect of the federal design, has expressly permitted.²⁴

Notwithstanding the clarity with which this Court has spoken for well over a century, the Court below is of the view that national banks have lost their immunity from state taxation. The decision below, in effect, ignores the decisions of this Court and the Courts of sister states which have been made since 1913, the year that the Federal Reserve Act was adopted, and hence after the alleged metamorphosis of national banks upon which the Court below primarily relies (A. 43). Of all the decisions of this Court relied on by the appellant, only two of the cases were de-

²⁴ See cases cited on pp. 26-28, *supra*. For state cases which have, without reservation, recognized the same principle see p. 11, n. 4.

cided prior to 1913. All of the state court cases cited were decided twenty or more years after the creation of the Federal Reserve System.²⁵

The decision below also disregards the fact that national banks still retain their character as federal instrumentalities. National banks are creatures of the Federal Government and owe their very existence to congressional legislation. 12 U.S.C. § 21 *et seq.* The National Bank Act, under which they are chartered, constitutes by itself a complete system for the establishment and government of national banks. *Deitrick v. Greaney*, 309 U.S. 190 (1940). This is the oldest existing instrumentality established by Congress to provide a safe, sound and effective banking system.²⁶ Membership in this system subjects national banks to the continuing detailed supervision of the Treasury Department, as the myriad of Treasury rules, regulations, required reports and examinations will attest.²⁷

²⁵ The following cases were decided after 1913: *Bank of California v. Richardson*, 248 U.S. 476 (1919); *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 106 (1923); *First National Bank of Guthrie, Center v. Anderson*, 269 U.S. 341, 347 (1926); *First National Bank of Hartford, Wisconsin, v. Hartford*, 273 U.S. 548, 550 (1927); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931); *Maricopa County v. Valley National Bank of Phoenix*, 318 U.S. 357 (1943); *First National Bank & Trust Co. v. West Haven*, 135 Conn. 191, 62 A. 2d 871 (1948); *First National Bank of Portland v. Marion County*, 169 Ore. 595, 130 P. 2d 9 (1942); *Northwestern National Bank of Sioux Falls v. Gillis*,—S.D.—, 148 N.W. 2d 293 (1967); *Austin v. Seattle*, 176 Wash. 654, 30 P. 2d 646 (1934). See *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41 (1940); *Michigan National Bank v. Michigan*, 365 U.S. 467, 472 (1961); *Contra, Liberty National Bank & Trust Co. v. Buscaglia*,—N.Y. 2d—, —N.E. 2d— (Docket No. 203, Ct. of App., December 27, 1967).

²⁶ See p. 12, *supra*.

²⁷ The administration of the national banking system is under the supervision of the Comptroller of the Currency, who is the chief officer in the Bureau of the Comptroller of the Currency,

As the *sine qua non* of the national banking system, national banks are the core of the federal banking structure. They are the means through which the Federal Government can accomplish its ends without dependence on, or resort to, state banks and the governments of the several states. The

a division of the Treasury Department. See 12 U.S.C. § 1 (1964). Thus, application to form a national bank must be made to the Comptroller, who determines whether the association is lawfully entitled to commence the business of banking. 12 U.S.C. §§ 21, 26 (1964). After the bank has been organized, it may transact its business only in the place and under the name specified in the bank's organization certificate unless the Comptroller approves a change in either name or location. 12 U.S.C. § 30 (1964). Once established, a national bank is required to make periodic reports of condition to the Comptroller. In addition, the Comptroller has the authority to require special reports "... whenever in his judgment the same are necessary for his use in the performance of his supervisory duties." 12 U.S.C. § 161 (1964). The bank is also subject to examinations at least twice a year by this division of the Treasury Department. 12 U.S.C. § 481 (1964).

The magnitude of supervision over national banks exercised by the Treasury Department is evidenced by the multitude of subjects governed by regulations issued by the Comptroller of the Currency. These include such areas as procedures (12 C.F.R. part 4); assessments of fees (12 C.F.R. part 8); fiduciary power of national banks (12 C.F.R. part 9); annual reports (12 C.F.R. part 10); changes in capital structure (12 C.F.R. part 14); international operations (12 C.F.R. part 20); ownership reports by certain persons (12 C.F.R. part 12); employee stock option and stock purchase plans (12 C.F.R. part 13); loans made by national banks secured by direct obligations of the United States (12 C.F.R. part 3); national bank loans secured or covered by governmental guarantees (12 C.F.R. part 3); national banks acting as insurance agents and as brokers or agents in making or procuring loans on real estate (12 C.F.R. part 2); solicitation of proxies (12 C.F.R. part 11).

In addition, the Comptroller has rule-making power over such varied subjects as general principles of prudent banking, lending limits, bank ownership of property, corporate practice and other miscellaneous matters, including suretyship, insurance, interest charges and usury. See Comptroller's Manual for National Banks (1966).

instances in which the Congress has so engaged the national banks are numerous. National banks have been authorized to purchase, hold, underwrite and deal in (without limitation as to amount) obligations of the United States, Federal Home Loan Banks, the Federal National Mortgage Association, the International Bank for Reconstruction and Development, the Inter-American Development Bank and the Asian Development Bank. 12 U.S.C. § 24 (Seventh) (1964). State banks may deal and invest in such securities only if they are permitted to do so under state law.

To assist the Federal Government in promoting trade and commerce and to act as fiscal agents of the United States, if so required, national banks are empowered, under 12 U.S.C. § 601 *et seq.*, to establish branches in foreign countries. Moreover, under 12 U.S.C. § 611 (1964) *et seq.*, national banks may organize Edge Act corporations to engage in international and foreign banking, or other financial operations, and to act when required by the Secretary of the Treasury as a fiscal agent of the United States.

Congress, in controlling the lending limits of national banks, directly affects the availability of credit throughout the Nation. 12 U.S.C. § 371 (1964), for example, prescribes the authority of national banks to make real-estate mortgage loans. The lending authority of state banks, on the other hand, is controlled by each of the respective several states. Through national banks, however, Congress can make national adjustments to the credit market.

In addition to their membership in the national banking system, national banks are also the keystone of the Federal Reserve System. The only banks, indeed the only financial institutions of any kind in the United States, which are *required* to be members of the Federal Reserve System are national banks. See 12 U.S.C. § 222 (1964). The function

of the Federal Reserve System is to establish and effect national fiscal and monetary policy.

"An efficient monetary mechanism is indispensable to the steady development of the nation's resources and a rising standard of living. The function of the Federal Reserve System is to foster a flow of credit and money that will facilitate orderly economic growth, a stable dollar, and long-run balance in our international payments." The Federal Reserve System: Purposes and Functions 1 (1963).

The national monetary policy of the Federal Reserve Bank is effected throughout the United States primarily by means of the Federal Reserve System's control over the reserve positions of national banks. It is these reserves which determine the degree to which a national bank can make loans, investments, and, in general, extend credit.²⁸ The complicated mechanics through which fiscal control is exerted over the national economy need not be discussed in great detail. Suffice it to say, as *required* members of the Federal Reserve System, national banks are the indispensable vehicles for effecting national fiscal policy.

Non-member banks (including state member banks which voluntarily leave the system) are not subject to the requirements of the Federal Reserve System. This fact was underscored by the recent action of the State of Ohio in the last week of December, 1967. During that week the Federal

²⁸ The reserve positions of national banks is determined principally through the open-market operations of the Federal Reserve System and the establishment of discount rates and reserve requirements. For a complete discussion of these financial tools see American Bankers Association, *The Commercial Banking Industry*, 85-90 (1962). A more detailed treatment is contained in *The Federal Reserve System: Purposes and Functions*, 63 (1963), published by the Board of Governors of the Federal Reserve System.

Reserve Board raised the reserve requirements for its member banks. The State of Ohio, on the other hand, reduced its reserve requirements for members of its banking system.²⁹

The opinion below points to the fact that state banks can also join this Federal Reserve System (A: 47). But, this does not make national banks any less indispensable. As of June 30, 1967, national banks controlled approximately 71% of the total deposits of members of the Federal Reserve System.³⁰ Rather, the establishment of the Federal Reserve System (contrary to the view of the Court below)³¹ has enhanced the fiscal and economic role of national banks. The enormous growth of the Nation made the Federal Reserve System necessary as an addition to the Nation's existing banking structure. The Federal Reserve System, however, was a complement to, not a substitute for, the national banking system. Without the permanent availability and resources of national banks, the Federal Reserve System could not implement the monetary and fiscal policy of the Nation.

The opinion below also points to the fact that the authority of national banks to engage in general banking has grown.³² This fact was recognized by this Court in *Colorado National Bank v. Bedford*, 310 U.S. 41, 48 (1940). But national banks have always had a proprietary as well

²⁹ American Banker (December 29, 1967), p. 12. The Ohio Superintendent of Banks and Chairman of the Ohio Banking Board was quoted as saying: "for every \$6 or so that the Federal Reserve is pulling out of the credit channels, our action restores only about 40 cents."

³⁰ F.D.I.C. Report of Call No. 80, p. 3 (June 30, 1967). The total deposits as of this date for member national and state banks, respectively, were \$211,731,199,000 and \$86,431,503,000.

³¹ See page 46 of the Appendix.

³² See page 47 of the Appendix.

as a governmental nature. They have been privately owned and have conducted private banking activities since their origin; this was and still is a fundamental feature of the congressional scheme. For this reason any analysis of so-called "proprietary versus governmental" functions is inappropriate. This Court, moreover, has decided that such an analysis misconceives the nature of the delegated powers of the Federal Government. *Federal Land Bank of St. Paul v. Bismarck*, 314 U.S. 95, 102 (1941):

"The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477. It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32; *Graves v. New York ex rel. O'Keefe*, *supra*, 477."

Rather than following the decisions of this Court which have unequivocally sustained the tax immunity of national banks, the Court below relied on cases dealing with a licensee and lessees of government property, an employee of the Home Owners Loan Corporation, government contractors and a railroad.³³ Clearly, none of these cases involved the

³³ *City of Detroit v. Murray Corporation of America*, 355 U.S. 489 (1958). *United States v. Township of Muskegon*, 355 U.S. 484 (1958). *United States v. City of Detroit*, 355 U.S. 466 (1958). *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). *James, State Tax Commissioner v. Dravo Contracting Co.*, 302 U.S. 134 (1937). *Railroad Company v. Peniston*, 18 Wall. 5 (1873).

taxation of a federal institution which even remotely resembles a national bank in character or function. In contrast to those decisions, this appeal involves national banks, which for over a century have had a permanent and continuing participation in the financial and economic affairs of the Federal Government. In this role they have been subject to a pervasive scheme of federal control. National banks, as members of the national banking system and Federal Reserve System, perform vital functions in implementing the fiscal and monetary policies of this Nation.

For these reasons, this Court could say with confidence that the status of national banks "as tax-immune instrumentalities of the United States is beyond dispute."³⁴ Congress has not seen fit to authorize the imposition of state sales and use taxes on national banks. Purchases by national banks, therefore, are exempt from the Massachusetts Sales and Use Taxes.

III. PURCHASES BY NATIONAL BANKS ARE IMMUNE FROM THE MASSACHUSETTS SALES TAX BECAUSE THE LEGAL INCIDENCE OF THE TAX IS ON PURCHASERS.

A. This Court is Not Bound by the Determination of the Court Below as to the Legal Incidence of the Massachusetts Sales Tax, because Federal Rights are Involved.

The Court below held that national banks, as purchasers, cannot claim any federal statutory or constitutional immunity from the Massachusetts Sales Tax because the Massachusetts Sales Tax is a tax imposed upon the seller of goods, not the purchaser. This Court has repeatedly held that it will not be bound by such a state Court characterization of

³⁴ *Department of Employment v. United States*, 385 U.S. 355, 360 (1966).

a state tax when the imposition of such a tax affects an asserted federal immunity or otherwise involves federal rights. If this were not so, federal rights and immunities could be avoided by the several states with impunity merely by characterizing a state tax to the state's advantage.

In *Society for Savings v. Bowers*, 349 U.S. 143 (1955), two mutual savings banks attacked the imposition of an Ohio property tax on the value of United States securities held in their portfolios. The Ohio Supreme Court upheld the tax as one on the "intangible property interests" of the depositors as owners of the banks. The Ohio Court regarded the bonds as merely the measure of the tax, not the subject matter of it. Speaking for this Court, Justice Harlan said:

"The Ohio court . . . has held that this tax is imposed on the depositors. But that does not end the matter for us. We must judge the true nature of this tax in terms of the rights and liabilities which the statute, as construed, creates. In assessing the validity of the tax under federal law, we are not bound by the state's conclusion that the tax is imposed on the depositors, even though we would be bound by the state court's decision as to what rights and liabilities this statute establishes under state law. The court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax. 'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)." (Footnote omitted.) 349 U.S. at 151.

This Court concluded (contrary to the Ohio Supreme Court) that the Ohio tax was upon the bonds held by the bank, and therefore invalid because of a federal statutory immunity established by Congress.

Although this Court has recognized that a state Court's interpretation of a taxing statute is binding as to questions of state law, such a construction is not determinative of whether the tax deprives the taxpayer of a federal right. Thus, it was said in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 443 (1940):

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction."

This was also held in *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930), and *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665, 674 (1950).³⁵ See *Galagher v. Crown Koshér Market*, 366 U.S. 617, 629 (1960), where this Court stated that the Massachusetts Court's characterization of a Sunday Law was not controlling in considering the statute's validity under the federal Constitution.

These well-established principles have been applied in cases (such as this appeal) involving federal immunity

³⁵ In *Federal Land Bank v. Bismarck Co.*, 314 U.S. 95, 99 (1941), there is language which indicates that a state Court's characterization of its tax is controlling. The respondents therein, however, conceded that the legal incidence of the tax was on the purchaser. Brief for respondents at 4. Hence this Court never had to focus on whether the state Court's decision was controlling. The *Bismarck* decision was decided well before most of the authorities relied upon by the appellant.

from state sales taxes. In *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110 (1954), this Court, in reversing the decision of the Supreme Court of Arkansas, held that the United States Government, rather than certain private contractors, was the purchaser; and hence it was unconstitutional to apply the Arkansas Gross Receipt Tax Law to the transaction therein involved. The Court was of the view that "... the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest" (347 U.S. at 110). To the identical effect is *United States v. County of Allegheny*, 322 U.S. 174, 184 (1944), and *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 84 (1946).

The latter case involved the imposition of a sales tax on oil sold for export. The California Supreme Court held that the incidence of the tax was on the vendor. This Court, in reversing the California Court's decision, held that the tax was an unconstitutional state excise on exports. With respect to the state Court's characterization of its tax as being on the seller for the privilege of conducting a retail business, rather than on the sale or because of the sale, this Court said:

"[I]t is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect." 329 U.S. at 84.

Since the rights of the appellant under 12 U.S.C. § 548 (1964), and under the Constitution of the United States rest upon the characterization of the Massachusetts Sales Tax as a vendor or a vendee tax, the Supreme Judicial Court's

characterization of that tax as a vendor tax is not binding on this Court.

B. The Legal Incidence of the Massachusetts Sales Tax is on National Banks as Purchasers.

If this Court decides (as the appellant submits it must) that national banks are immune from state taxation except as set forth in 12 U.S.C. § 548 (1964), the subsidiary question of whether the Massachusetts Sales Tax is a tax on national banks as purchasers is raised.³⁶ The authorities in considering such questions have developed the so-called "legal incidence" test. An examination of the Massachusetts Sales Tax Statute and the controlling decisions of this Court clearly establish that the legal incidence of the Massachusetts Sales Tax is on purchasers and that the Supreme Judicial Court of Massachusetts was in error in holding to the contrary.

St. 1966, c. 14, § 1, subsec. 2, imposes an excise upon sales at retail in Massachusetts of tangible personal property. It is not a tax on the privilege of selling at retail, or a so-called "occupational tax." Rather, it is a tax imposed on the sale itself. The full amount of the tax must be *added* to the sales price and *collected* from the purchaser.

"Subsection 3. Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a

³⁶ As previously mentioned in footnote 3 on page 10, this case also involves the Massachusetts Use Tax, which is not even arguably on anyone but the purchaser.

debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts." (Emphasis supplied.)

Contrary to the opinion of the Court below, there is a severe penalty in the statute for a vendor's failure to add the tax to the sales price and collect it from a purchaser. A vendor's registration can be suspended or revoked. This means that an offending vendor can be prevented from doing business in Massachusetts. St. 1966, c. 14, § 1, subsec. 7. Subsection 7 provides in relevant part:

"No person shall do business in this commonwealth as a vendor unless a registration or registrations shall have been issued to him as hereinafter described.

"The commissioner may suspend or revoke the registration of any person or may refuse to issue any such registration for failure to comply with the provisions of this section³⁷ or with all pertinent rules and regulations of the commission promulgated hereunder." (Emphasis supplied.)

³⁷ The reference to "this section" is a reference to section 1, which is the entire Sales Tax Act (including the provisions relating to the statutory duty to collect the tax), rather than just to the subsection itself. This is the obvious intent of the Legislature. Any possible doubt in this regard is completely dispelled by section 7 of chapter 64H of the General Laws, the permanent successor to subsection 7. In the General Laws, section 1 has become chapter 64H, and subsection 7 has become section 7. St. 1967, c. 757. In section 7 the reference to "this section" has been changed to "this chapter," which can only refer to the entire Sales Tax Act. The Massachusetts Sales Tax Act became permanent four months after the opinion below was published. Hence the Supreme Judicial Court was unaware of the phrase "this chapter" in section 7.

To emphasize that the vendor is a conduit acting only as a collector of the tax, not only must the tax be added to the sales price and collected from the consumer, but also the amount of the tax must be stated and charged separately from the sales price.

"Subsection 5. Upon each sale of tangible personal property taxable under the provisions of this section the amount of tax collected by the vendor from the purchaser under the provisions of this section shall be stated and charged separately from the sales price and shown separately on any record thereof at the time the sale is made, or on any evidence of sale issued or used by the vendor." (Emphasis supplied.)

Conversely, "In determining the 'sales price' there shall be excluded . . . the amount of reimbursement of tax paid by the purchaser to the vendor . . ." St. 1966, c. 14, § 1, subsec. 1(14)(c)(iv). In addition, it is unlawful for a vendor to advertise that the tax will be absorbed or assumed by the vendor or that it will not be added to the selling price.

Subsection 23. Unlawful advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense." (Emphasis supplied.)

The role of the vendor as tax collector is underscored by the fact that he receives compensation for collecting the tax. St. 1966, c. 14, § 1, subsec. 14.

The character of the Sales Tax as a tax on purchasers is thrown into even bolder relief by the numerous vendees who are exempt from the tax. Thus sales to the United States, the Commonwealth of Massachusetts or any political subdivision thereof and their respective agencies are exempt. Also exempt are sales to religious, scientific, charitable and educational organizations. St. 1966, c. 14, § 1, subsec. 6(d) and (e).

The conclusion drawn from this analysis that the Massachusetts Sales Tax is a tax on the purchaser is unquestionably supported by the authorities. The test developed and applied is whether the "legal incidence" of the tax falls on the vendor or the vendee. Under the pertinent decisions of this Court, the "legal incidence" of the Massachusetts Sales Tax is on the purchaser.

The leading case on this point is *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), which held that the incidence of a North Dakota sales tax was on the purchaser, a Federal Land Bank, and hence sales to it were immunized from state taxation by congressional legislation. The sales-tax provisions were strikingly similar to those of the Massachusetts Act.³⁸ In holding that the

³⁸As quoted on pages 97n and 98n of the *Bismarck* opinion, the statute reads in relevant part:

" . . . There is hereby imposed . . . a tax of two percent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise . . . sold at retail in the State of North Dakota to consumers or users; . . .

" . . . Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts. . . .

" . . . It shall be unlawful for any retailer to advertise or hold

legal incidence of the North Dakota sales tax was on the purchaser, this Court said:

“It is clear that the North Dakota statute makes the purchaser, petitioner here, liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part. The Supreme Court of North Dakota has held that the sales tax is laid upon the purchaser.” 314 U.S. at 99.

To the identical effect are *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952), and *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110 (1954).

A converse situation was presented in *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41, 44 (1940). That case involved a 2% state tax on, *inter alia*, the value of safe-deposit services. The Colorado National Bank contended that it, as a federal instrumentality, was immune under 12 U.S.C. § 548 from the payment of a tax on the rentals it received for such services. This Court assumed the tax would be invalid if laid upon the bank, but held that the tax was upon the user of the safe-deposit boxes and not upon the bank. Hence the tax was valid. It based this conclusion on the ground that the tax statute required “. . . as far as practicable, [to] add the tax imposed . . . to the value of services or charges showing such tax as a separate and distinct item . . .” For this reason this Court was of

out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer . . .”

the view that the incidence of the tax was on the user of the safe-deposit box.

The state Courts have adopted the same test. The legal incidence of a sales tax which the vendor is required to collect from the purchaser is on the purchaser. Thus, in *Avco Manufacturing Corp. v. Connelly*, 145 Conn. 161, 171, 140 A. 2d 480, 484 (1958); the Court relied on *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110 (1954), in holding, *inter alia*:

"It is clear, however, under the decisions of the United States Supreme Court in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 . . . and *State of Alabama v. King & Boozer*, 314 U.S. 1 . . . that a sales tax imposed upon a vendor who, in turn, is required to collect the tax from the purchaser is a tax upon the purchaser and that the imposition of such a sales tax in a transaction where the purchase is actually made for the government is unconstitutional."

The decisions in *National Bank of Hyde Park in Chicago v. Isaacs*, 27 Ill. 2d 197, 188 N.E. 2d 704 (1963), and *National Bank of Detroit v. Revenue Dept.*, 340 Mich. 573, 66 N.E. 2d 237 (1954), app. dismissed *per curiam*, 349 U.S. 934 (1955), are in accord with the foregoing principle. Both decisions held that the legal incidence of each of the sales taxes in question was on the retailer (and hence a national bank as an instrumentality of the Federal Government was not exempt from any tax which might be passed on to it by a retailer). But these holdings were based upon the peculiar provisions of the sales tax statutes there involved: those statutes (unlike the Massachusetts Sales Tax) did not require the seller to pass on the tax or collect it from the purchaser. At best there was evidence indicating only that there was a custom of passing along the burden to the buyer.

Undoubtedly, if the sales-tax statutes in question in those cases *had required* the seller to collect the tax, the decisions would have placed the legal incidence of the tax on the purchaser.

The Michigan decision illustrates this point well. It relied completely on an earlier decision of the same court in *Federal Reserve Bank of Chicago v. Department of Revenue*, 339 Mich. 587, 64 N.W. 2d 639 (1954), which contained a complete discussion of the "legal incidence" question. That case held that a general sales tax on the privilege of engaging in the retail business as enacted in Michigan did not excuse retailers from including in the amount of their gross proceeds (used in computing their annual tax) proceeds from sales to the Federal Reserve Bank of Chicago. The basis for the decision was the Court's conclusion that the legal incidence of the tax was on the retailer. In answer to the plaintiff's contention that congressional legislation prohibited the levying of a sales tax on it, the Court said at page 593:

"It is important to note here that, as distinguished from the sales tax act provisions of some of the other States, the Michigan statute does not *require* the retailer to collect the tax from the purchaser or consumer." (Emphasis supplied.)

The Court elaborated upon the relevance of this requirement in a detailed analysis of the *Bismarck, King & Boozer* and *Kern-Limerick* decisions. In so doing it expressly distinguished the *Bismarck* decision on the ground that the North Dakota statute in that case *required* the retailer to collect the tax from the purchaser, thus imposing the legal incidence of the tax on the latter.

Also distinguishable is the statute involved in *Northwestern National Bank of Sioux Falls v. Gillis*, S.D., 148

N.W. 2d 293 (1967). The sales-tax statute in that case did not *require* the tax to be added to the sales price; it merely permitted it. Since the incidence of the tax was thus on the vendor, the Court held that a national bank could not be taxed on property which it sold.

The opinion of the Massachusetts Court below states that "A sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (A. 38). Despite this statement and despite the fact that a vendor is *required* to collect the Massachusetts Sales Tax, the Court below held that the legal incidence of the tax is on the vendor. As a basis for so holding, the Court erroneously assumed that the Massachusetts statute imposes no penalty on the vendor for failing to collect the tax from the purchaser. This error was the ground on which the Court distinguished the *Federal Land Bank v. Bismarck Lumber Co.* and *Alabama v. King & Boozer* decisions, stating that they were "clearly distinguishable" because they involved statutes which contained a *penalty* for a vendor's failure to collect the tax from the vendee (A. 39-40). It is submitted that the Supreme Judicial Court's reliance on this distinction is misplaced. First, the existence or nonexistence of such punitive measures (to which this Court in those cases made no reference) was not the basis of those decisions. In fact, in the *Federal Land Bank* case this Court noted that the "pertinent sections" of the North Dakota sales tax were set forth in the margin. There were no penalty provisions so set forth. Second (as previously demonstrated), the Massachusetts Sales Tax Act *does* contain a penalty for a vendor who fails to collect a tax. The vendor's registration can be suspended or revoked and he can be required to cease doing business in Massachusetts. St. 1966, c. 14, § 1, subsec. 7.

The teaching of the decisional law is clear. Where a sales tax is *required* to be added to the sales price and collected

from a purchaser, the legal incidence of that tax is on the purchaser. This, of course, is precisely the nature of the Massachusetts Sales Tax. St. 1966, c. 14, § 1, subsec. 3, expressly provides that “. . . each vendor in this commonwealth *shall add to the sales price and shall collect from the purchaser the full amount of the tax . . .*” (Emphasis supplied.) Moreover, there is a penalty for a vendor's failure to so add and collect the tax. His registration can be suspended or revoked and he can be required to cease doing business in Massachusetts. The tax, furthermore, must be stated and charged separately from the sales price. In addition, vendors cannot advertise that they will absorb or assume it.

Since federal rights are involved, this Court is free to, and should, decide *de novo* the question of the legal incidence of the Massachusetts Sales Tax. By reason of the provisions of the Massachusetts Sales Tax statute, the answer to this question must be that the legal incidence of the tax is on the purchaser.

Conclusion.

The appellant submits that the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts should be reversed. This Court should declare that the imposition of the Massachusetts Sales and Use Taxes on purchases by the appellant is repugnant to the laws and Constitution of the United States.

If this Court should decide (as appellant submits it should not) that the Massachusetts Sales Tax is a tax on vendors, this Court should nevertheless reverse the Court below with respect to the application of the Massachusetts Use Tax to purchases by appellant. In such event, this

Court should also declare that the Massachusetts Sales Tax may not be imposed on sales by appellant.

Respectfully submitted,

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Brief Appendix.

United States Code, Title 12—Banks and Banking.

NATIONAL BANK SHARES.

§ 548. State taxation.

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and

business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. § 5219; Mar. 4, 1923, ch. 267, 42 Stat. 1499; Mar. 25, 1926, ch. 88, 44 Stat. 223.)

Acts and Resolves.

STATUTE 1966, CHAPTER 14.

[Advance Copy, 1966 Massachusetts Acts and Resolves,
Pages 6-55.]

TAXATION OF RETAIL SALES OF TANGIBLE PERSONAL PROPERTY.

SECTION 1. A tax on retail sales is imposed in accordance with the following subsections;—

Subsection 1. Definitions.—When used in this section the following words, terms and phrases shall have the following meaning except where the context clearly indicates a different meaning:—

(i) "Sales price", the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money or otherwise.

(c) In determining the "sales price" there shall be excluded . . . (iv) the amount of reimbursement of tax paid by the purchaser to the vendor under section; . . .

IMPOSITION AND RATE OF TAX.

Subsection 2. An excise is hereby imposed upon sales at retail of tangible personal property in this commonwealth by any vendor at the rate of three per cent of the gross receipts of the vendor from all such sales of such property, except as otherwise provided in this section.

Subsection 3. Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of

the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.

Subsection 4. For the purpose of adding and collecting the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof, to be reimbursed to the vendor by the purchaser, the following formula shall be in force and effect as follows:—

<i>Amount of Sale.</i>	<i>Amount of Tax.</i>
\$0.01 to \$0.18 inclusive	No tax
.19 to .38 inclusive	1 cent
.39 to .78 inclusive	2 cents
.79 to 1.18 inclusive	3 cents

In addition to a tax of three cents on each full dollar, a tax shall be collected on each part of a dollar in excess of a full dollar in accordance with the above formula.

Subsection 5. Upon each sale of tangible personal property taxable under the provisions of this section the amount of tax collected by the vendor from the purchaser under the provisions of this section shall be stated and charged separately from the sales price and shown separately on any record thereof at the time the sale is made, or on any evidence of sale issued or used by the vendor.

Subsection 6. Exemptions.—The following sales and the gross receipts therefrom shall be exempt from the tax imposed by this section:—

(a) Sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States.

(d) Sales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies.

(e) Sales to any corporation, foundation, organization or institution, organized exclusively for religious, scientific, charitable or educational purposes, including hospitals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; . . .

(t) Sales of tangible personal property through coin operated vending machines at ten cents or less, provided the retailer is primarily engaged in making such sales and keeps records satisfactory to the commission.

REGISTRATION OF VENDORS.

Subsection 7. Registration of Vendors.—(a) Application for Registration. No person shall do business in this commonwealth as a vendor unless a registration or registrations shall have been issued to him as hereinafter described. Every person desiring to do business in this commonwealth as a vendor shall file with the commissioner for each place of business an application for registration, in such form as the commissioner with the approval of the commission, prescribes, giving such information as the commissioner requires. At the time of making the application, such person shall pay to the commissioner a registration fee of one dollar for each registration.

(b) *Issuance of Registration.* After compliance with the provisions of paragraph (a) by the applicant, the commissioner may issue to such applicant a separate certificate of registration for each place of business within the commonwealth. The certificate of registration shall not be

assignable; shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein; and shall at all times be conspicuously displayed at the place for which issued.

(c) *Suspension or Revocation of Registration.* The commissioner may suspend or revoke the registration of any person or may refuse to issue any such registration for failure to comply with the provisions of this section or with all pertinent rules and regulations of the commission promulgated hereunder. Any person aggrieved by such suspension, revocation or refusal may, within ten days after written notice thereof has been mailed or delivered to him, apply to the commission for a hearing setting forth in such application a full statement of the grounds on which he intends to rely; provided, that he has filed with the commission at the time of making such application a surety company bond running to the commonwealth, with a surety company authorized to do business in the commonwealth as surety, in such sum as the commission shall fix, conditioned upon the payment of all taxes then due under this section and to become due during the pendency of such appeal to the commission and of any further appeal to the appellate tax board or to the supreme judicial court. After such hearing, the commission shall give written notice of its decision. Any person aggrieved by a decision of the commission under this section may appeal therefrom to the appellate tax board within ten days after such written notice has been mailed or delivered to him. Such appeals to the appellate tax board shall be preferred cases to be heard, unless cause appears to the contrary, in priority to other cases. During the pendency of any such appeal to the commission or to the appellate tax board or to the supreme judicial court, the suspension or revocation so appealed from shall be inoperative. In the case of an

appeal from the refusal of the commissioner to issue a registration, the commissioner shall issue such registration during the pendency of the appeal.

A person whose registration has been suspended or revoked shall pay to the commissioner a fee of five dollars for the reissuance of a registration. The commissioner shall not issue a new registration after the suspension or revocation of a registration unless he is satisfied that the former holder of the registration will comply with the provisions of this section and with all pertinent rules and regulations thereunder.

(d) *Failure to Register.* Any person who fails to register as required by this subsection and does business in this commonwealth as a vendor shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars. The superior court may on petition of the commissioner restrain such person from doing business as a vendor in this commonwealth.

RETURNS AND PAYMENT OF TAX.

Subsection 9. Filing of Returns.—On or before the twentieth day of each calendar month, each vendor who has made any sale at retail taxable under the provisions of this section during the preceding calendar month shall file a return with the commissioner. Such returns shall be filed upon a form furnished by the commissioner and approved by the commission and containing such information reasonably necessary for the administration of this section as the commissioner may require. The commission may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis. Upon application of a vendor, the commissioner may issue a classified permit establishing such vendor's percentage of exempt

sales. Such classified permits may be amended or revoked as to classification whenever the commissioner shall determine that the percentage of exempt sales is inaccurate or that such classification is not appropriate.

Subsection 10. Payment of Tax.—At the time of filing his return as provided by this section, the vendor shall pay to the commissioner the taxes imposed by this section. The taxes for the period for which a return is required to be filed by a vendor under this section shall be due and payable to the commissioner on the date established for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of gross receipts and taxes due thereon.

Subsection 14. Compensation for Collecting Tax.—For the purpose of defraying in whole, or in part, his expenses in keeping the records prescribed and collecting and remitting the tax imposed by this section, the taxpayer shall be entitled to deduct and withhold from the taxes otherwise due from him two per cent thereof, provided he has complied with all of the requirements of this section and all pertinent rules and regulations of the commission promulgated hereunder.

Subsection 15. Assessment of tax.—(a) *In General.*—The tax imposed by this section shall be deemed to be assessed at the amount shown as the tax due on the return filed under the provisions of this section and on any amendment, correction or supplement thereof or at the amount properly due under this section; whichever is less.

(b) *Assessment of Deficiencies.*—If the commissioner determines from the verification of a return, or otherwise, that the full amount of any tax due under this section, or

any portion thereof, has not been assessed or is not deemed to be assessed, he may, at any time within three years after the date the return was filed or the date it was due, whichever occurs later, assess the same with interest as provided in subsection nineteen to the date when the deficiency assessment is required to be paid hereunder, first giving notice to the vendor to be assessed of his intention; and such vendor or a representative of the vendor shall thereupon have an opportunity, within thirty days after the date of such notification, to confer with the commissioner or his duly authorized representative as to the proposed assessment. After the expiration of thirty days from the date of such notification, the commissioner shall assess the amount of the tax remaining due the commonwealth, or any portion thereof, which he believes has not theretofore been assessed and shall give notice to the vendor so assessed. One or more deficiency assessments may be made of the amount due for one or for more than one period. Any tax so assessed shall be paid to the commissioner within fourteen days after the date of the notice of assessment.

In the case of an arithmetic or clerical error apparent upon the face of the return, the commissioner may assess a deficiency attributable to such error without giving prior notice of his intention to the vendor to be assessed.

(c) *Refund of Overpayments.*—If, on the verification of a return, or otherwise, the commissioner determines that an overpayment of the full amount of any tax, and interest and penalties thereon, due under this section with respect to such return has been made by the vendor, the amount of such overpayment may, in his discretion, be deducted from any unpaid amounts due for other periods or on other returns of the vendor. The balance of such overpayment shall be refunded to the vendor if it exceeds ten dollars; if such balance is ten dollars or less, it may be

refunded in the discretion of the commissioner. Interest upon such refund at six per cent per annum shall be paid from a date six months after the date of the payment of said amount to the commissioner, the date upon which the return was due or the date upon which the return was filed, whichever is the latest.

(d) *Extension by Agreement.*—If, before the expiration of the time prescribed under paragraph (b) for the assessment of any deficiency, the commissioner and the vendor consent in writing to extend the time for the assessments of any deficiency, the commissioner or his duly authorized representative may inspect and examine the records of the vender as provided in subsection twelve, may give any notice of intention to assess required by this subsection and may assess any deficiency at any time prior to the expiration of the extended time. The period so extended by the commissioner and the vendor may be further extended by subsequent agreements in writing made before the expiration of the time last extended.

(e) *Exceptions to Assessment Limitation.*—The commissioner may assess the tax imposed by this section at any time if a vendor has filed no return; has filed a false or fraudulent return with intent to evade the tax imposed by this section; or has filed a return with a wilful attempt in any manner to defeat or evade the tax imposed by this section.

(f) *Notice of Assessment.*—If the assessment of any tax is in excess of the amount shown on the return as the tax due, the commissioner shall, as soon as may be, give written notice to the vendor of the amount of the assessment, the amount of any balance due and the time when the same is required to be paid, but failure to receive such notice shall not affect the validity of the tax.

Subsection 16. Collection of Unpaid Taxes.—Assessed taxes remaining unpaid after the date upon which the same

are required to be paid shall bear interest at the rate of six per cent per annum until paid, which shall be added to and become part of the tax. Every person who fails to pay to the commissioner any sums required by this section shall be personally and individually liable therefor to the commonwealth. The term "person", as used in this subsection, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to pay over the taxes imposed by this section.

Subsection 17. Remedies for Collection.—The commissioner shall have for the collection of taxes imposed by this section all the powers and remedies provided by chapter sixty of the General Laws for the collection of taxes on personal estate by collectors of taxes of towns. Any warrant for the collection of a tax imposed under this section may be issued to any deputy collector, sheriff, deputy sheriff or constable, and he shall have authority to proceed thereunder anywhere within the commonwealth. The officer, to whom a warrant for the collection of such a tax is given, shall collect said tax, penalties and interest as herein provided, including the charges and fees provided in section fifteen of chapter sixty, and shall pay over such amounts collected to the commissioner. Such officer, other than a deputy collector, may collect and receive for his fees the sum which an officer would be entitled by law to receive upon an execution for a like amount.

The commissioner may recover any tax imposed by this section in an action of contract in the name of the commonwealth. Any tax imposed by this section may also be collected by any information brought in the supreme judicial court by the attorney general at the relation of the commissioner. The court may issue an injunction upon such information, restraining the further prosecution of

the business of the vendor until such taxes, with interest and costs thereon, have been paid.

Interest, penalties and additional taxes imposed under this section may be recovered in the manner provided for in this subsection.

Subsection 18. Jeopardy Assessments.—If the commissioner believes that the collection of any tax imposed by this section will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest and penalties, the assessment of which is provided for by law). Such tax, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the commissioner for the payment thereof. Upon failure or refusal to pay such tax, penalty and interest, the commissioner shall proceed forthwith to the collection thereof.

Subsection 19. Interest and Penalties.—(a) *Interest.*—All taxes imposed by this section shall be due and payable on or before the due date of the return, determined without regard to any extension of time. The portion of any taxes not paid on or before said date shall bear interest from said date at the rate of one half of one per cent per month, or major fraction thereof, until it is paid. Deficiency assessments made under subsection fifteen and additional taxes assessed under paragraph (c) of this subsection shall include interest as provided in this subsection to the date when the tax so assessed or any unpaid balance thereof is required to be paid. Interest so assessed shall become a part of the tax.

(b) *Penalty for Late Returns.*—If any vendor required to file a return under this section fails to file such return within the time prescribed by this section, there shall be

added to and become a part of the tax, as an additional tax, a sum equal to one half of one per cent of the tax ultimately determined to be due for each month, or major fraction thereof, that the vendor is in default, but not less than ten dollars.

(c) *Additional Tax.*—If a vendor who has been notified by the commissioner that he has failed to file a return or has filed an incorrect or insufficient return, refuses or neglects within thirty days after the date of such notification to file a proper return, or if a vendor has filed a false or fraudulent return or has filed a return with a wilful attempt in any manner to defeat or evade the tax, the commissioner shall determine, according to his best information and belief, the sales and gross receipts of such vendor taxable under this section and shall assess the same at not more than double of the amount so determined, which additional tax shall be in addition to the other penalties provided by this section.

Subsection 20. Abatement of Taxes.—If the tax shown on the return filed by any person pursuant to this section is believed to be excessive or illegal, such person may apply in writing to the commission, upon a form approved by the commission, for an abatement thereof at any time within three years from the last day for filing such return, determined without regard to any extension of time. Any person aggrieved by the assessment of any tax imposed by this section may apply in writing to the commission, upon a form approved by the commission, for an abatement thereof at any time within two years after the date upon which the notice of assessment is sent. The commission shall, if requested, give the applicant a hearing upon his application; and if the commission finds that the tax is excessive in amount or illegal, the commission shall abate the tax in whole or in part accordingly.

If an abatement is granted and the tax has been paid, the state treasurer, upon certification of the commission, shall repay to the person who paid the tax the amount of such abatement, with interest thereon at the rate of six per cent per annum from the time when it was paid; provided, that if such person is a vendor who has collected reimbursement of such tax, no actual refund of money shall be made to such vendor until he shall first establish to the satisfaction of the commission, under such regulations as it may prescribe, that the vendor has repaid to the purchaser the amount for which the application for refund is made. In lieu of any refund required to be made, a credit may be allowed therefor on payment due from the applicant. The commission shall give notice to the applicant of its decision upon any application for abatement under this subsection.

Subsection 21. Limitation of Abatements.—No tax assessed on any person liable to taxation under this section shall be abated in any event unless the person assessed shall have filed, at or before the time of bringing his application for abatement, a return as required by subsection nine for the period to which his application relates; and if he failed without good cause to file his return within the time prescribed by law, or filed a fraudulent return, or having filed an incorrect or insufficient return, has failed, after notice, to file a proper return, the commission shall not abate the tax below double the amount for which the person assessed was properly taxable under this section.

Subsection 22. Appeal to Appellate Tax Board.—Any person aggrieved by the refusal of the commission to abate, in whole or in part, under subsection twenty a tax assessed or collected under this section, may appeal therefrom within ninety days after the date of the notice of the decision of the commission, or within six months after the time when the application for abatement is deemed to be denied, as

provided by section six of chapter fifty-eight A of the General Laws, by filing a petition with the clerk of the appellate tax board. If, on hearing, said board finds that the person making the appeal was entitled to an abatement under subsection twenty from the tax assessed on him, it shall make such abatement as it sees fit. Findings of fact of the appellate tax board shall be final and conclusive, and shall be communicated in writing to the petitioner and the commission within five days thereafter. If a tax so abated has been paid, the state treasurer, upon presentation to him of the notice of the decision of the board, shall repay to the petitioner the amount of the abatement and interest at the rate of six per cent per annum from the date of payment or the due date of the return, whichever is later.

The remedies provided by this subsection and subsections twenty and twenty-one shall be exclusive.

PROHIBITION AND PENALTIES.

Subsection 23. Unlawful Advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense.

TAXATION OF THE STORAGE, USE OR OTHER CONSUMPTION OF TANGIBLE PERSONAL PROPERTY.

SECTION 2. A tax on the storage, use or other consumption of tangible personal property is imposed in accordance with the following subsections:

IMPOSITION AND LIABILITY FOR TAX.

Subsection 2. Imposition and Rate of Tax.—Except as otherwise provided in this section an excise is hereby imposed upon the storage, use or other consumption in this commonwealth of tangible personal property purchased from any vendor for storage, use or other consumption within this commonwealth at the rate of three per cent of the sales price of the property.

Subsection 3. Liability of User.—Every person storing, using or otherwise consuming in this commonwealth tangible personal property purchased from a vendor shall be liable for the tax imposed by this section. His liability shall not be extinguished until said tax has been paid to the commissioner, except that a receipt from a vendor engaged in business in this commonwealth or from a vendor who is authorized by the commissioner, under such regulations as the commission may prescribe, to collect the tax and who is, for the purposes of this section, regarded as a vendor engaged in business in this commonwealth, given to the purchaser pursuant to subsection four of this section, shall be sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

Subsection 4. Liability of Vendor.—Every vendor engaged in business in this commonwealth and making sales of tangible personal property for storage, use or other consumption in this commonwealth not exempted under this section, shall at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the commissioner. The tax required to be collected by the vendor shall constitute a debt owed by the vendor to

this commonwealth. For the purpose of uniformity of tax collection by the vendor and for other purposes the provisions of subsections three, four and five of section one are hereby incorporated in and made applicable to this section.

EXEMPTIONS.

Subsection 5. Exemptions.—The tax imposed by this section shall not apply to the following:

(a) Sales upon which taxes are imposed under section one of this act.

(b) Sales exempt from the taxes imposed under section one of this act; . . .

RETURNS AND PAYMENT OF TAX.

Subsection 9. Returns and Payment of Tax.—The provisions of subsections nine, ten, eleven and thirteen of section one of this act are hereby incorporated in and made applicable to this section. Every vendor who is required or expressly authorized to pay the tax imposed by this section shall file returns and pay the tax in accordance with the provisions of such subsections applicable to the filing of returns and the payment of the tax and as shall be prescribed by regulations of the commission.

Subsection 10. Monthly Returns—Content and Form—Payment of Tax by Purchaser.—(a) *Filing Returns.*—Every purchaser who is required to pay a tax under this section shall file a return with the commissioner within twenty days after the end of each calendar month. Such returns shall show the total sales prices of all tangible personal property purchased at retail sale upon which the tax imposed has not been paid by the purchaser to vendors, the amount of tax for which the purchaser is liable,

and such other information as the commissioner deems necessary for the computation and collection of the tax. The commission may by regulation require returns under this subsection to be filed on a quarterly rather than a monthly basis.

(b) *Contents of Return.*—The return filed by a purchaser shall include the sales prices of all tangible personal property purchased as taxable retail sale during the calendar month or other period for which the return is filed and upon which the tax imposed has not been reimbursed by the purchaser to vendors.

(c) *Payment of Tax.*—At the time of filing his return as provided in this subsection the purchaser shall pay to the commissioner the amount of tax for which he is liable as shown by the return.

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ASSESSMENT, COLLECTION, ADMINISTRATION, ENFORCEMENT,
ABATEMENTS AND APPEALS.

Subsection 11. The assessment and collection of the tax imposed by this section, the administration and enforcement thereof, the abatement of taxes imposed by this section, and the rights and procedure for appeals shall be governed by the provisions of subsections fifteen to twenty-two, inclusive, of section one of this act, which provisions are hereby incorporated in and made applicable to this section. For the purposes of this section said provisions shall be construed to apply to any purchaser who becomes liable to taxation under this section.

PROHIBITION AND PENALTIES.

Subsection 12. Unlawful Advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the

tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense.

Subsection 13. Criminal Penalties.—Any vendor or purchaser who wilfully fails to file a return required by this section when due, or wilfully files an incorrect or insufficient return, or, with intent to evade taxation, files no return or a false or fraudulent return or submits a false certificate, affidavit or other statement to the commissioner or the commission relating to the amount of tax for which he is liable, shall be punished by a fine of not less than one hundred nor more than ten thousand dollars, or by imprisonment for not more than one year, or both.

STATUTE 1966, CHAPTER 483.

[Advance Copy, 1966 Acts and Resolves, Pages 453-454.]

SECTION 1. Subsection 3 of section 1 of chapter 14 of the acts of 1966 is hereby amended by adding the following paragraph:—

Notwithstanding the provisions of this subsection, the excise imposed by subsection two of this section or by subsection two of section two upon sales at retail, or upon the storage, use or other consumption of motor vehicles or trailers shall be paid by the purchaser to the registrar of motor vehicles in the manner prescribed by the commissioner. The vendor thereof shall not add the tax to the sales price and shall not collect the tax from the purchaser. The vendor thereof shall, however, furnish to the purchaser, the registrar and the commissioner a sworn statement of the sale upon a form prescribed by the commis-

sioner, with the approval of the commission, giving such information as the commissioner may require for the determination of such tax.

SECTION 2. This act shall take effect on November first, nineteen hundred and sixty-six. *Approved August 8, 1966.*

Massachusetts Sales and Use Tax Emergency Regulations.

EMERGENCY REGULATION No. 6

National Banks—Federal Savings and Loan Associations

The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax.

National banks and Federal savings and loan associations making sales of tangible personal property must collect the sales tax to the same extent as other vendors making such sales.

STATE TAX COMMISSION

Guy J. Rizzotto,—*Chairman*

Leo E. Diehl

Donald T. Wood

May 31, 1966.

A true copy

Attest:

Neil P. Shea

Executive Assistant

Massachusetts State Tax Commission
